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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 988

AMBASSADOR MANAGEMENT CORPORATION, MILTON M. FISCHER and RUDOLPH BAUER, as Executors under the Last Will and Testament of GISELA BAUER, Deceased, and 239-241 FULTON CORPORATION,

Petitioners,

AGAINST

INCORPORATED VILLAGE OF HEMPSTEAD.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF.

HENRY WALDMAN,
Counsel for Petitioners.

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Cases Cited.

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Petitioners,

against

INCORPORATED VILLAGE OF HEMPSTEAD.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Ambassador Management Corporation, Milton M. Fischer and Rudolph Bauer, Executors under the Last Will and Testament of Gisela Bauer, Deceased and 239-241 Fulton Corporation, respectfully pray that a *writ of certiorari* issue to review the decision of the Appellate Division, 2nd Department, of the Supreme Court of the State of New York, which affirmed a judgment of the Supreme Court of the State of New York, which dismissed the complaints of the petitioners, on the pleadings.

A.

Statement of the Matter Involved.

I. The petitioners are owners of real property situate within the territorial limits of the Incorporated Village of Hempstead, an incorporated village in the County of Nassau, State of New York. The village trustees, pursuant to certain statutes, hereinafter mentioned, resolved to acquire land in the village for use as a parking place for motor vehicles. They also resolved to assess the full cost of the acquisition of such land against real property within an area, less than the area of the entire village, in the form of a special assessment for benefit. The petitioners' respective properties are within this limited area. Pursuant to such resolution, proceedings were instituted in the County Court of Nassau County, for acquiring title to the land desired. That court appointed a Commissioner of Assessment, who fixed the assessments against the properties of the petitioners, which assessments were confirmed by the County Court of Nassau County, and entered against such properties.

II. Thereupon the petitioners instituted a common suit in equity, in the Supreme Court of New York, in and for Nassau County, praying for a decree declaring the said assessments null and void. The Supreme Court (the court of first instance), dismissed the complaint on the pleadings, with an opinion (186 Misc. 74). From this judgment, the petitioners appealed to the Appellate Division of the Supreme Court (the intermediate appellate Court) which affirmed unanimously and without opinion (270 App. Div. 898). The petitioners applied to the Court of Appeals for leave to appeal to it from the judgment entered on the order of affirmance of the Appellate Division, but the motion was denied. (R., p. 27.)

III. The constitutional question involved was fully and fairly presented in the complaint, in the court of first instance, and in the Appellate Division, as well as on the application for leave to appeal to the Court of Appeals.

IV. The constitutional invalidity of the assessment complained of was sufficiently raised in the 20th paragraph of the complaint (R., p. 9).

> "20. That the said assessment for benefit was unlawfully levied, imposed and entered in that the defendant had no power to assess the cost of the acquisition of real property for a parking place on a limited area of assessment; that the area of such assessment should have included all the real property contained within the territorial limits of the defendant; that if there is any power vested in the defendant by statute to assess for benefit the cost of the acquisition of real property for a parking place on real property within a limited area, such statute is in contravention of Section II of Article I of the Constitution of the State of New York and Articles V and XIV of the Constitution of the United States of America and that the said assessment was unlawfully levied, imposed and entered as before alleged at a time when the amount of the compensation to be paid to the owner of the property acquired had not been finally determined." (By inadvertent error the word "Articles" instead of "Amendments" was used.)

V. The only opinion in the case was rendered by Lockwood J. in Special Term of the Supreme Court (the court of first instance), 186 Misc. 74. (R., pp. 20-22.) A copy of this opinion is annexed to petitioners' brief. The opinion states that

> "the sole question presented is whether or not the assessments here involved were levied in accordance with the provisions of the statute, *and if so, are the statutory provisions constitutional?*" (Emphasis ours.)

VI. The constitutional question was disposed by Mr. Justice Lockwood in the following language:

> "The constitutional point urged by plaintiffs is that defendant acquired the realty for use as a parking space in a proprietary, and not in a governmental capacity, and that defendant could operate the parking space as a business enterprise, charging rental for the use thereof. That since defendant owns the parking space in a proprietary capacity, an assessment to pay the cost of acquisition is the taking of property without just compensation. There is no substance to this contention."

B.

The Question Presented.

In the state courts, the petitioners contended (1) that there was no statutory authority for the assessments, and (2) that if statutory authority was found, it was violative of the constitutional rights of the Petitioners. Those courts held adversely to the Petitioners on both questions. They held that there was statutory authority, and, of course, that such authority did not contravene either of the constitutions. Though we may not, perhaps, question here their decisions with respect to the state statutes and state constitution, we nevertheless deem it proper and possibly necessary to point out that the statutory authority which was deemed sufficient, consisted of three sections of the Village Law, all contained in Article 14 of that law. Obviously, that article is a purely procedural statute. The three sections are 306, 312 and 314. Section 306 defines "highway", and includes "parking place" as a highway. The other two sections give the village the power to acquire land and levy assessments for highways and other improvements mentioned in Article 14. The assessments were of course held valid on the theory that a parking

place was a "highway". The only statute which grants a village the power to acquire land for a parking place is subdivision 18-a of Section 89 of the Village Law. This subdivision read (at the time the assessments here in question were levied) as follows:

> "Public Hackstands. May purchase or lease within its corporate limits for the establishment and maintenance of hack stands and parking places for vehicles and may lease and license the use of such lands or any part thereof, for such term and at such annual rental, as it may determine. *Lands as used in this subdivision shall not be construed to include streets and public highways.*" (Italics ours.)

The last sentence of subdivision 18-a—a substantive statute—is clearly not in harmony with the definition of a highway in Section 306, which is a procedural or adjective statute.

The question which the Petitioners pray this Court to determine is:

> Do state statutes, which empower a municipality to impose and levy a special assessment against real property within a limited area for the cost of the acquisition of real property to be held and used by the municipality in a proprietary and not a governmental capacity, contravene Amendments V and XIV of the United States Constitution?

C.

Reasons for the Allowance of Writ.

The question presented is one involving fundamental rights under the Constitution of the United States, for such assessments take private property for public use without just compensation in violation of the 5th Amendment, and their

effect is to deny to Petitioners, and those similarly situated, the equal protection of the laws, in violation of the 14th Amendment.

So far as diligent search of the books discloses, the precise question involved here has never been passed upon by this Court, nor, with exception of the instant case, by any other court, Federal or state. The distinction between property held and used by a municipality as a proprietor, and property held by it as a sovereign, has been long recognized by this Court and by other courts, as well. As we point out in our brief, when a municipality holds and uses property as a proprietor, it engages in a business for profits; profits which go into its treasury, and so, inure to the benefit of all of its residents. To compel a limited number of its property owners to furnish all the capital of the business, would in effect, permit all of the other residents to become equal partners in a business enterprise to the capital of which they had not contributed.

The question involved, being one of first impression, is of great general interest, and it merits consideration by this Court. The acquisition and operation by municipalities of public utilities and other business activities and their operation as profit making businesses is going on apace all over the United States, and is not limited to parking places. Municipalities now own and operate electric light plants, water works, bus lines, trolley lines and subways. Whether a municipality has the constitutional right to impose the cost of the acquisition of such businesses on a limited number of its property owners is therefore a question of prime importance to every municipality in the land, and its residents as well, so that a determination of the question by this Court, it being the court of last resort, is not only highly desirable, but imperative.

Your Petitioners therefore verily believe that this Application presents a case cognizable by this Honorable Court

under the Constitution and statutes of the United States and the rules of this Honorable Court, and one eminently proper for review by this Honorable Court.

WHEREFORE, your Petitioners respectfully pray that a *writ of certiorari* be issued out of and under the seal of this Honorable Court directed to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, commanding that court to certify and send to this court for its review a full and complete transcript of the record of all proceedings in said suit, proceeding or matter, and to stand and abide by such order and direction as your Honorable Court shall deem meet and the circumstances of the case require, and that your Petitioners may have such other and further relief or remedy in the premises as to this Honorable Court may seem just and proper.

Dated, New York, N. Y., January 27, 1947.

HENRY WALDMAN,
Of Counsel for Petitioners.

IN THE

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Petitioners,

against

INCORPORATED VILLAGE OF HEMPSTEAD.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

POINT I.

The case involves rights guaranteed by the Constitution of the United States.

The Petitioners in their complaints in this case challenged the validity of the special assessments on the ground that the statutes which the state courts held to be authority for their imposition, contravened Amendments V and XIV of the United States Constitution. They were invalid under the 5th Amendment, since they deprived the Petitioners of property without just compensation, and invalid under the 14th Amendment, since they were denied the equal protection of the laws.

Villages in New York are governed by the provisions of

the Village Law (*McKinney's Consolidated Laws*, Village Law, Vol. 63).

Subdivision 18-a of section 89 of the Village Law, empowers the village to acquire lands for use as parking places for motor vehicles. At the time of the adoption of the resolution authorizing the assessments this subdivision read:

> "Public Hackstands. May purchase or lease within its corporate limits for the establishment and maintenance of public hackstands or parking places for vehicles *and may lease and license the use of such lands or any part thereof, for such term and at such annual rental, as it may determine.* Lands, as used in this subdivision, shall not be construed to include streets and public highways." (Italics ours.)

In the state courts, the petitioners did not challenge the power of the village to acquire land for the establishment of parking places. Nor do they challenge such power here. But they contended, and here contend, that the words in subdivision 18-a: "*and may lease and license the use of such lands or any part thereof, for such term and at such annual rental, as it may determine*" makes the character of the ownership proprietary and not governmental, and that any statute which grants power to levy and impose a special assessment for benefit for the cost of the acquisition of property to be held and used by a municipality as a proprietor and not as a sovereign contravenes the United States Constitution.

The distinction between proprietary ownership and governmental ownership is not fanciful, but real. Where property is held and used in the former character, the municipality operates it as a business, with all the burdens and obligations of a business privately owned.

South Carolina v. *U. S.*, 199 U. S. 437.

The opinion in the South Carolina case, at page 462, cites

with approval *Lloyd* v. *Mayor of N. Y.*, 5 N. Y. 369, 364. We quote from the opinion in that case:

> "The corporation of the City of New York possesses two kinds of powers, one governmental and public, and to the extent they are held and exercised is clothed with sovereignty—the other private and to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the former the corporation is a municipal government, and while in the exercise of the latter, is a corporate, legal individual."

The right to lease out the parking place and receive the rents, makes it a proprietary holding and a private business. The rents received by the village would go into its treasury, and be expended for the benefit of all the inhabitants of the village. The capital of the business would be furnished by those specially assessed, and all the inhabitants would be equal partners in the business, and all would share equally in the profits of a business to which only a limited number had contributed the capital. Under these circumstances, the assessments would be the taking of private property for public use, without just compensation, in violation of the 5th Amendment, and it would be a denial of the equal protection of the laws, in violation of the 14th Amendment.

The distinction between ownership by a municipality as a sovereign and ownership as a proprietor is aptly pointed out in a leading New York case, *Matter of Rapid Transit R. R. Commissioners,* 197 N. Y. 81, at pages 96-97:

> "The city owns the subway, and it is a railroad corporation so far as the construction, operation and leasing is concerned. It was not required, but simply permitted, to build and operate the road. It is authorized to lease its railroad, either for 'a specified

> sum of money or a specified proportion of income, earnings or profits;' or it may operate the road itself and charge such rates of fare for the transportation of persons and property as may be fixed by its own board and officers. * * * In other words, the subway is a business enterprise of the city, through which money may be made or lost, the same as if it were owned by an ordinary railroad corporation. *It was built by and belongs to the city as a proprietor, and not as a sovereign.*" (Emphasis ours.)

The situation with respect to parking places is precisely similar to the New York City subways. The village is not required but simply permitted to create parking places; it is authorized to lease the parking places for a "specified sum of money". And it may be of interest to the Court, that none of the property owners along the lines of the New York City subways were assessed for the cost of its construction, despite the fact that their properties were greatly benefited.

POINT II.

The matter involved is of the highest public interest and importance.

That this matter is of the utmost importance to every municipality and its land owners throughout the land, is obvious. Parking places are being established everywhere. In the trend of the times, municipalities are now engaging in other activities of business nature, heretofore indulged in solely by private individuals or corporations. It is important, therefore, that this Court determine whether assessments for the costs of acquisitions of such businesses, may be imposed against a limited number of property owners. This question has never been determined by any court, so far as we have been able to ascertain. Unless reversed by this Court, the decision of the Appellate Division of New York is likely

to become the law of the land. It is therefore of the utmost importance, that this Court examine the question at this time in order to make certain that an erroneous construction of the United States Constitution on a matter of fundamental rights, affecting, not merely the parties here, but the public generally, be not imbedded in our law by an accumulation of decisions in other courts, upon the authority of the decision in this case, before this Court has passed upon the question.

This Court has determined that the exaction of an assessment for benefit against property where there was no power to impose it, is an unconstitutional taking of property without due process. *Lee* v. *Osceola & L.R.R. Co.,* 268 U. S. 643.

It is Petitioners' contention that the statutes permitting the assessments are arbitrary; in such case, they may be assailed under the 14th Amendment.

> *Kansas City Ry.* v. *Road Dist.,* 289 U. S. 71;
> *Memphis & Charleston Ry.* v. *Pace,* 282 U. S. 241;
> *Gast Realty &c. Co.* v. *Schneider Granite Co.,* 240 U. S. 55.

POINT III.

A statute which grants power to a municipality to assess for benefit the cost of the acquisition of property which it holds as a proprietor, and not as a sovereign, against property within a limited area, clearly contravenes Amendments V and XIV of the United States Constitution.

The law with reference to special assessments is very clearly stated in 48 *American Jurisprudence,* p.548, as follows:

> "The power of special assessment does not extend to raising general revenue or to reimbursing the treasury

> for general revenues paid out. In other words, a special or local assessment cannot be imposed to pay for an improvement which is primarily of public benefit. The legislature cannot by fiat make that a local improvement which is not such an improvement in its essential nature. An unconstitutional and invalid assessment cannot attain constitutionality and legality under the guise of a special or local assessment. A law which would attempt to make one person or a given number of persons under the guise of local assessments pay a general revenue for the public at large would not be an exercise of taxing power, but an act of confiscation."

The fact that some or all of the property assessed may have been benefited by the parking place involved here does not give the village the right to impose these assessments. It can only have such right where the property acquired is held by it, not as a proprietor, but as a sovereign. Such is Petitioners' contention. The right to lease out the parking place, enables the village to derive revenue from it, and it would be manifestly unfair to impose the cost of the enterprise upon a limited number, when the entire community would benefit; as unfair as if the use and enjoyment of a public improvement paid out of the general revenues of a municipality would be permitted to some, and barred to others.

The state courts have held that the statutes permit the imposition of the assessments. That being so, we say that the statutes are invalid, since they deprive the Petitioners of their property, and the equal protection of the laws. As pointed out by Mr. Justice Harlan in *Norwood* v. *Baker*, 172 U. S. 269:

> "But the power of the legislature in these matters is not unlimited. There is a point beyond which the

> legislative department, even when exerting power of taxation, may not go consistently with the citizen's right of property."

Throughout the litigation, great stress was laid on the alleged fact, brought out in brief and argument, that the village was presently making no charge for parking, although there is nothing in the record to substantiate the allegation. However, the learned judge in the court of first instance was impressed by such alleged fact, for he virtually based his decision on it, as expressed in his opinion, where he said:

> "If defendant were operating the parking space as a business, deriving revenue from it, of course plaintiffs would be justified in complaining that the cost of the acquisition was defrayed by a local assessment, but no such allegation is contained in the complaint."

The learned judge overlooked or disregarded the very familiar rule of law that the constitutional validity of a statute may not be determined by what was done under it or by what is being done under it, *but only by what may be done under it.*

> *Stuart* v. *Palmer,* 74 N. Y. 183, 188;
> *City of Rochester* v. *West,* 164 N. Y. 511.

Assuming, *arguendo,* that the village is not presently operating it as a business, but permits free parking, that fact is of no moment, for by virtue of subdivision 18-a of Section 89 of the Village Law, there is nothing to prevent it at any time from leasing it out to a parking place operator, or itself charging fees for parking, thereby deriving revenue from it.

CONCLUSION.

The Petitioners respectfully submit, that this is a case *eminently proper for this Honorable Court to review, so that the serious breach in fundamental rights guaranteed by the Constitution, affected by this case, may not remain permanent, and itself serve as a precedent and basis for further breaches.*

Dated, January 28, 1947.

Respectfully submitted,

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Appendix A.

OPINION.

LOCKWOOD, J.:

Ambassador Management Corp'n v. Incorporated Village of Hempstead—Plaintiffs move for judgment on the pleadings under Rule 112, Rules of Civil Practice. The complaint alleges six causes of action. The facts alleged as to each of the three plaintiffs are substantially the same, except as to parcels of real property involved and the amounts of assessments. The question involved is the power of the defendant village to levy a local assessment for the cost of land to be used as a parking place. The defendant admits all the material factual matters alleged in the complaint and sets up six separate and distinct defenses. The undisputed facts are substantially as follows: Early in 1940 the defendant village instituted proceedings pursuant to article 14 of the Village Law to acquire certain lands within the block bounded by Fulton, Main, Front and Washington streets in the Village of Hempstead for a parking place. The land to be acquired was shown on two maps. Commissioners of estimate were duly appointed and thereafter made awards to the owners of the property acquired shown on map 6R 234, totalling, with interest, $368,951.19. Their report was confirmed on July 19, 1943. The awards to the owners of land shown on map 6D 234A, with interest, was $42,772.76. The commissioners' reports was confirmed on August 2, 1943. The village appealed from the order of confirmation as to the land shown on map 6R 234, but the appeal was withdrawn upon the consent of the owner of the property acquired, to a reduction of $27,640. The village charged against this fund $3,512.60 for legal and other expenses connected with the appeal and the negotiations resulting in the settlement, and prorated the balance in reduction of the benefit assessments by 5.9642

per cent. The final report of the commissioners of assessment as to the land shown on map 6 R 234, fixing the total cost at $404,637.15 and apportioning the assessment upon the benefit parcels, was confirmed on July 19, 1943. As to the land shown on map 6D 234A, the final report of the commissioners of assessment fixing the total cost at $42,771.76 and apportioning the assessment upon the benefit parcels, was confirmed on August 2, 1943. No appeals have been taken from the orders of confirmation. Plaintiffs bring this action in equity to set aside the assessments as invalid, null and void. Plaintiffs contend that the defendant had no power to assess the cost of the acquisition of real property for a parking space on a limited area of assessment; that the area of assessment should have included all the real property contained within the territorial limits of the village; that if there is any power vested in the defendant by the statute to assess for benefit the cost of acquisition of real property for a parking space on real property within a limited area, such statute is in contravention of section 11 of article 1 of the Constitution of the State of New York, and Articles V and XIV of the Constitution of the United States. Further, that the assessment was unlawfully levied, imposed and entered at a time when the amount of compensation to be paid to the owners of property acquired had not been finally determined. Stripped of the technicalities of pleading, and possibly somewhat obscured by the numerous legal contentions of the parties, the sole question presented is whether or not the assessments here involved were levied in accordance with the provisions of the statute, and if so, are the statutory provisions constitutional? The Village Law, article 14, section 306, defines "highway" as including a "parking space." Section 307 provides that when a village is authorized to acquire real property for a parking place, "the cost of acquisition of such real property, or a portion of such costs, may be assessed upon real property benefited by the improvements in accordance with the provisions of this article." Section

312: "* * * The board, by resolution, may also determine and direct that the whole or a specified portion of the cost of real property to be acquired in the proceeding shall be borne by the real property benefited by the improvement * * *" Section 314: "Whenever the board of trustees shall have directed that any real property shall be acquired for the purposes provided for in this article, and shall have determined that the cost and expense of the acquisition, or a portion thereof, shall be borne by the real property benefited thereby, it shall * * * fix and determine upon an area of assessment for benefit and it may review and alter such area of assessment at any time before the entry of the final decree of the Court as to assessments, or the entry of the order of the Court confirming the report of the Commissioners of Estimate, as the case may be." The board of trustees of defendant were fully authorized to impose the assessments alleged in the complaint, and to determine the area of assessment. The plaintiffs have no reason to complain that the assessment was reduced by reason of the appeal and the subsequent settlement by a reduction in the awards. The constitutional point urged by plaintiffs is that defendant acquired the realty for use as a parking space in a proprietary, and not in a governmental capacity, and that defendant could operate the parking space as a business enterprise, charging rental for the use thereof. That since defendant owns the parking space in a proprietary capacity, an assessment to pay the cost of acquisition is the taking of property without just compensation. There is no substance to this contention. Defendant did not acquire this real property as a public hack stand referred to by section 89, subdivision 18a of the Village Law. The land was acquired as a public parking space and must be held by the village in trust for that purpose. If defendant were operating the parking space as a business, deriving revenue from it, of course plaintiffs would be justified in complaining that the

cost of the acquisition was defrayed by a local assessment, but no such allegation is contained in the complaint. The parking space here involved is in the congested business section of the village and its acquisition was, no doubt, designed to relieve traffic conditions caused by the attraction of customers to the business establishments operated in the area which the trustees deemed benefited by the improvement. Judgment upon the pleadings is granted in favor of the defendant.